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Supreme Court, U.S.
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No. 08-595

In The

Supreme Court of the United States

MONROE YALE MANN,

Petitioner,

v.

BERNARD ABEL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The New York Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Court lack jurisdiction to review this case because the judgment of the New York Court of Appeals, dismissing a public official's defamation complaint based on its holding that the statements at issue were non-actionable opinions as a matter of New York law, rests on an independent and adequate state constitutional ground?

CORPORATE DISCLOSURE STATEMENT

Respondent Westmore News, Inc. has no parent company and no publicly held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

Respondents are the political columnist, publisher, editor and corporate owner of the Westmore News, an independent weekly newspaper serving the Towns of Rye Brook and Port Chester in Westchester County, New York. Petitioner was the Town Attorney of the Town of Rye who, decades earlier, had also served on the Port Chester School Board. The allegedly defamatory statements appeared in a column entitled "The Town Crier," written by Respondent Abel, and published on the newspaper's clearly-identified "opinion" page. An "Editor's Note" at the bottom of the opinion page stated that the column "represent[ed] . . . [Appellant Abel's] opinion . . . " and "not necessarily that of this newspaper." Pet. App. 1a.

The "Town Crier" column at issue in the action was published on August 22, 2003, during a heated local election for control of the Rye Town Board, under the headline "Borelli on Par With Marie Antoinette." In his column, commenting solely on the official actions of local public officials, Abel roundly criticized several Town incumbents, including Borelli, who was a Rye Town Councilman; the Rye Town Supervisor; other members of the Rye Town Board; and Respondent, for what Abel viewed as political machinations and various public policy offenses. Pet. App. 15a-17a.

Employing metaphorical and hyperbolic language throughout, the column's opinionated conclusion, in regard to Petitioner, was that his actions as Town

Attorney, and his past policies as a member of the School Board, were "destructive." Under a subheading, entitled "Who is the real Mann?," Abel described Petitioner as a "political hatchet Mann" and "one of the biggest powers behind the throne" in the Town of Rye government. Abel also wrote that it appeared that "Mann pulls the strings" and questioned whether Mann was "leading the Town of Rye to destruction." *Id.*

Following publication, Petitioner commenced this action against Respondents, and the newspaper's two editors, alleging that the statements contained in the article were false and published with actual malice. Before engaging in discovery, Respondents moved to dismiss the complaint, contending that the action was filed in bad faith by Petitioner public official to chill the exercise of protected free speech and that the suit was frivolous. The trial judge denied the motion and the Appellate Division affirmed without addressing Respondents' constitutional claims. Thereafter, Petitioner moved for summary judgment on the complaint. Respondents opposed the motion and cross-moved for summary judgment asserting that the article contained only expressions of opinion by Abel. The trial judge denied both motions on the ground that there were disputed issues of fact, and did not address whether the article constituted protected opinion. The parties were directed to proceed to trial. Pet. App. 2a-3a.

At trial, evidence on five key statements, that Petitioner alleged to be factual and false, was submitted to the jury. The statements criticized Petitioner for (1) his admitted switch of party affiliation in order to retain his position as Town Attorney in a Democratic Town Administration; (2) his "most instrumental" role in admittedly supporting a policy adopted in the 1970's that severed the Port Chester and Blind Brook School Districts; (3) the alleged "last minute" timing and (4) the allegedly "destructive" effects, of the School District severance policy; and (5) his "behind-the-throne" exercise of political "power" that columnist Abel "think[s]" is "leading the Town of Rye to destruction."[1]

At the conclusion of the trial, the jury, which was never instructed to distinguish between actionable fact and protected opinion, found that statements in the article were false and defamatory and that defendant Westmore News had published the statements

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[1] At trial Respondents acknowledged that their column had inadvertently erred in describing two subsidiary facts: Petitioner's switch of party affiliation was not from Republican to Democrat, but from Republican to Conservative; and as to the district severance policy (supported by Petitioner 35 years earlier), while Respondents maintained that the timing of the severance was, relatively speaking, at the "last minute" and did cause serious dislocations, they acknowledged that the policy was in fact not approved "just before the school year started," but more than a year prior. Respondents argued that those two errors were not substantially false or cognizably defamatory and, in any event, that they had not published the minor erroneous facts with actual malice.

either with the knowledge that they were false or in reckless disregard of their truth or falsity. The jury awarded Petitioner $75,000 in compensatory damages against Westmore News and punitive damages against both Westmore News and Abel in the amount of $15,000 each. Respondents appealed, arguing that the statements were constitutionally protected opinions or subsidiary facts that were either not substantially false or, in any event, not published with actual malice. Pet. App. 10a-14a.

The Appellate Division upheld the jury's determination that Petitioner was defamed, and concluded that he was entitled to compensatory damages, albeit at a reduced amount. *Mann v. Abel*, 12 A.D.3d 646 (N.Y. App. Div. 2d Dept. 2007); Pet. App. 7a-9a. The court dismissed the punitive damages awards and ordered a new trial unless Petitioner stipulated to a reduction in the compensatory damage award, which he did, leaving in place only the reduced award against Westmore News. The Appellate Division's opinion never addressed Respondents' claim of constitutional protection for opinion. *Id.*

Respondents then appealed as of right, on the basis of "substantial constitutional questions" presented, Pet. App. 3a, contending that the Appellate Division had failed to apply New York's distinctive approach to distinguishing opinion protected under the New York Constitution from facts that may, under New York law, be made the subject of a defamation action. In the alternative, Respondents argued that the Appellate Division must have misapplied the

precedents under the First Amendment to the United States Constitution forbidding liability absent a proper finding of actual malice.

The Court of Appeals unanimously reversed on the sole ground that the allegedly defamatory publication constituted non-actionable opinion as a matter of New York law under governing Court of Appeals precedents. It therefore concluded that the lower courts had erred in permitting the case to proceed to trial, held that summary judgment should have been awarded to Respondents before trial, and dismissed the complaint in its entirety. *Mann v. Abel*, 10 N.Y.3d 271 (N.Y. 2008); Pet. App. 1a-6a.

In light of this ruling on state constitutional grounds, the Court of Appeals had no need to address Respondents' alternative ground for reversal based on Petitioner's failure to meet his heavy federal constitutional burden of proving that Respondents had published any false statement of fact with actual malice under the standards of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

REASONS FOR DENYING THE WRIT

The Petition seeks review of a decision of the New York Court of Appeals, which cited only state law precedents, on the ground that it allegedly got the facts wrong and purportedly conflicts with other state court decisions as well as a handful of federal trial court decisions applying New York law. There is

no contention that there is any division within the lower courts about the question presented, not to speak of division among the federal courts of appeals or state appellate courts. At best, Petitioner seeks review based on a fact-bound Petition from a decision that clearly rests on an independent and adequate state constitutional ground. *Michigan v. Long*, 463 U.S. 1032 (1983). Consequently, this Court lacks jurisdiction to review the decision below even if there were, otherwise, any substantial basis for granting the writ.

I. The New York Court Of Appeals Relied On An Independent And Adequate State Constitutional Ground For Its Decision

In this case, the New York Court of Appeals exercised its jurisdiction to review the judgment affirmed by the Appellate Division as an appeal "as of right," based on "substantial constitutional questions," under *N.Y. CPLR* 5601(b)(1). Respondents' successful Jurisdictional Statement to the Court of Appeals expressly argued that "a substantial constitutional question was directly presented regarding construction and application *of the state constitutional privilege for statements of opinion*."[2] (Emphasis added).

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[2] *See* excerpt from Respondents' Letter Comments of May 23, 2007 to the New York Court of Appeals, reproduced in Respondents' Appendix. In that letter brief Respondents took the

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Not only is it clear that the Court of Appeals exercised its jurisdiction to hear Respondents' substantial constitutional claims regarding protection for statements of opinion under the state constitution, but the conclusion is also unavoidable that its sole basis for dismissing the complaint rested on that Court's application of *Article 1, §8, N.Y.S. Constitution* to accord with what it has long viewed as the broader protection to statements of opinion provided under the state constitution than under the First Amendment.

In an unbroken line of decisions dating back to the case of *Immuno AG v. J. Moor-Jankowski*, 77

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position that the Court of Appeals was justified in retaining subject matter jurisdiction *on state law grounds* regarding Respondents' *state constitutional opinion defense*. In that same Jurisdictional Statement Respondents argued, in the alternative, that a second substantial constitutional question was presented "regarding construction and application of the federal constitutional privilege for any statements of fact not published with actual malice." The appeal was subsequently briefed on both state and federal grounds and Respondents did argue that, if the state opinion ground was not held to be dispositive as a matter of law, then the Court should comply with its federal constitutional obligation to "independently review" the "entire record" in order to determine whether the jury's finding of "actual malice," based on allegedly false factual statements, could pass First Amendment muster under *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). However, because its ultimate disposition of the case was *based solely on state constitutional protection for statements of opinion as a matter of law*, the Court of Appeals did not reach, or ever discuss, the separate federal constitutional basis for reversal Respondents had argued.

N.Y.2d 235, *cert. denied*, 500 U.S. 954 (1991) (*Immuno II*), the N.Y. Court of Appeals has clearly announced its determination to protect statements of opinion more broadly under *Article I, §8* of the *N.Y. State Constitution* than under the First Amendment. The Court's analysis of the relative scope of state and federal constitutional protection for opinion was occasioned by this Court's decision to vacate and remand the Court of Appeals' original decision in *Immuno*, 74 N.Y.2d 548 (N.Y. 1989) (*Immuno I*), for reconsideration in light of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

In *Milkovich*, as the Court of Appeals later characterized, this Court had "put[ ] an end to the perception – as it turns out, misperception – traceable to dictum in Gertz v Robert Welch, Inc. (418 U.S. 323, 339-340) that, in addition to all other Federal constitutional protections, there is a 'wholesale defamation exemption for anything that might be labeled 'opinion.'" 77 N.Y.2d at 242. However, in *Immuno I*, operating at least in part on the *Gertz* dictum that *Milkovich* later rejected, the Court of Appeals had dismissed a defamation action on the ground that statements in a letter to the editor of a scientific journal were "the letter writer's statements of opinion . . . entitled to the absolute protection of the State and Federal constitutional free speech guarantees." *Id.* at 239.

On remand after *Milkovich*, the Court of Appeals was called upon to assess whether it "would adhere to [its] original determination that defendant's summary

judgment motion was properly granted and the complaint dismissed" and it ultimately did so, expressly "premising [its] decision on independent State constitutional grounds." 77 N.Y.2d at 240.[3]

Citing New York's status as "a cultural center for the Nation," its long tradition of "provid[ing] a hospitable climate for the free exchange of ideas," and the "expansive language of the State constitutional guarantee," the Court expressly chose to accord greater protection to statements of opinion under *Article I, §8* which, it held, "reflect[ed] the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms." *Id.* at 249.

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[3] In *Immuno II*, the Court's majority opinion undertook a "dual constitutional analysis," reviewing its prior determination under both federal and state constitutional law, "in compliance with the Supreme Court's direction on remand." *Id.* at 242. The Court's "further consideration in light of *Milkovich*," led the majority to conclude that the federal constitution supported its affirmance of summary judgment on grounds of protection for opinion. Under its state constitutional analysis the Court also concluded that summary judgment was warranted, with the majority holding that the state constitution "furnishes the operative standard in this State for separating actionable fact from protected opinion." *Id.* at 252. The majority declined to accept the positions of concurring judges that the Court should have limited itself to a federal constitutional analysis or to a state common law approach. *Id.* at 265 n.6.

As the Court of Appeals therefore reasoned and clearly articulated in *Immuno II*:

> "Had defendant initially presented the issue as one of independent State constitutional law, instead of as an undenominated argument premised on the assumed identity of State and Federal law, it might have been resolved on that basis a year ago. The intervening occurrence of Milkovich, however, does not cause us to change our explicit conclusion that the case was correctly analyzed and decided in accordance with the core values protected by the State Constitution." *Id.*
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> * * *
>
> "We therefore proceed to resolve this case independently as a matter of State law, concluding that – as we previously held in Immuno – the standard articulated and applied in Steinhilber furnishes the operative standard in this State for separating actionable fact from protected opinion." *Id.* at 252.

Proceeding to define its independent state law view of constitutional protection for statements of opinion, under *Article I, §8*, and in contrast to its understanding of the potential implications of what it viewed as this Court's narrower approach to protecting opinion in *Milkovich*, the Court of Appeals held that in order

> "to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff – we believe that an analysis

> that begins by looking at the content of the whole communication, its tone and apparent purpose (*Steinhilber v Alphonse*, 68 NY2d, at 293, supra) better balances the values at stake than an analysis that first examines the challenged statements for express and implied factual assertions, and finds them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances. * * * But statements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying any facts." *Id.* at 254.

Again contrasting its independent state law view to this Court's view in *Milkovich*, the Court of Appeals stated:

> "Our State law analysis of the remainder of the letter, however, would not involve the fine parsing of its length and breadth that might now be required under Federal law for speech that is not loose, figurative or hyperbolic (see, e.g., Unelko Corp. v Rooney, 912 F2d 1049 [9th Cir]). Isolating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered, indeed may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context." *Id.* at 254-55.

In sum, the Court of Appeals' expressly stated state law concern was to avoid any "hypertechnical

parsing of a possible 'fact' from its plain context of 'opinion,'" that might be the result of the federal analysis under *Milkovich* and that the Court of Appeals feared would "lose[ ] sight of the objective of the entire exercise, which is to assure that – with due regard for the protection of individual reputation – the cherished constitutional guarantee of free speech is preserved." *Id.* at 256.

It therefore held, in reaffirming its previous judgment dismissing the defamation complaint on state constitutional grounds, "that an approach that takes into account the full context of challenged speech, as previously set forth in Immuno and Steinhilber, accords with the central value of assuring 'full and vigorous exposition and expression of opinion on matters of public interest.' (Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369, 384, cert denied 434 U.S. 969.)" *Id.*

Since *Immuno II*, it has been clear that the preferred, and now operative, standard for the constitutional protection of statements of opinion in New York derives from the Court of Appeals' independent state law analysis, premised on the understanding of a reasonable reader, based on context rather than on a threshold parsing of "fact" from "opinion," which *Immuno II* had characterized as the centerpiece of a likely federal analysis under *Milkovich*.[4]

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[4] For a brief but authoritative review of New York's state constitutional opinion jurisprudence, post-*Milkovich*, *see* Robert D. Sack, *Sack on Defamation: Libel, Slander and Related*

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In *600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130 (N.Y. 1992), the next opinion case decided by the New York Court of Appeals, the defendant contended that his allegedly defamatory statements, made in opposition to a proposed building permit in the context of a heated public hearing conducted by a New York City Community Board, were constitutionally protected opinions. Just one year after *Immuno II*, the defendant expressly asserted his opinion defense under both the state and federal constitutions. Therefore, the Court of Appeals, following the pattern also set in *Immuno II*, proceeded to analyze the constitutional claim based on both state and federal law, specifically holding that the statements at issue were protected under both state and federal law, *citing Michigan v. Long*, 463 U.S. 1032 (1983).

Noting "this Court perceives the protection afforded by the First Amendment of the United States Constitution and that afforded by Article I, § 8 of the New York Constitution to be quite different," *id.* at 136, the Court found "Our determination that the order must be reversed rests on our conclusion that defendant's statements cannot be construed to allege facts under either analysis." *Id.*

Although the Court of Appeals in *600 West 115th Street* expressly applied both the federal and state constitutional analyses, the Court did reiterate its

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Problems (3d Ed. 2008), §4.2.4.4 at 4-25 – 4-26 and n.73 (collecting post-*Immuno II* New York cases).

preference for the broader state constitutional analysis that was

> "[d]esigned to avoid 'the fine parsing . . . that might now be required under Federal law' (id., at 255), the State law approach was viewed as better able to 'assure that – with due regard for the protection of individual reputation – the cherished constitutional guarantee of free speech is preserved.'" *Id.* at 145, *citing Immuno II* at 256.

Since *Immuno II* and *600 West 115th Street*, however, the Court of Appeals has eschewed any further dual federal and state analysis in the handful of subsequent cases that have presented the issue of constitutional protection for statements of opinion.

In *Gross v. New York Times Company*, 82 N.Y.2d 146 (N.Y. 1993), the Court of Appeals denied a motion to dismiss a defamation action addressed to a series of investigative news reports, premised on a defense of constitutional protection for opinion. However, it restated and reaffirmed that "this Court has . . . under our own State Constitution . . . embraced a test for determining what constitutes a nonactionable statement of opinion that is more flexible and is decidedly more protective of 'the cherished constitutional guarantee of free speech.'" 82 N.Y.2d at 152. It again contrasted what the Court has viewed as the narrower federal approach, "we stress once again our commitment to avoiding the 'hypertechnical parsing' of written and spoken words for the purpose of identifying 'possible "fact[s]"' that might form the basis of a sustainable libel action," *citing Immuno II*. *Id.* at 156.

In *Brian v. Richardson*, 87 N.Y.2d 46 (N.Y. 1995), the Court of Appeals affirmed dismissal of a defamation claim addressed to an "Op Ed" in the New York Times by the former Secretary of State. Clearly applying its preferred state law approach, the Court held that the column "made it sufficiently apparent to the reasonable reader that its contents represented the opinion of the author," *id.* at 54. It expressly applied the *Immuno II* analysis of the immediate and broader social context, as opposed to any narrower federal approach, rejected on state constitutional grounds in *Immuno II*, "that would first search a publication for specific factual assertions and then hold those assertions actionable unless they were couched in figurative or hyperbolic language." *Id.* at 51.

And in *Millus v. Newsday, Inc.*, 89 N.Y.2d 840 (N.Y. 1996), the Court of Appeals' most recent decision on the issue of opinion until the case at bar, the Court affirmed the trial court's grant of summary judgment, again focusing on the central state constitutional considerations of *Immuno II*, as reiterated in *Brian*, of context and the understanding of the reasonable reader. It concluded that, "[w]hen viewed within the context of the editorial as a whole . . . a reasonable reader would conclude that the statement at issue is an opinion." 89 N.Y.2d at 842.

Finally, and consistent with this entire line of precedent, it is evident that the decision in this case represents the current culmination and further application of the Court of Appeals' independent state law view of the appropriate analysis for distinguishing

between unprotected factual statements and constitutionally-protected statements of opinion. As analyzed in the Court below, the state constitutional analysis was clearly the one and only basis for the Courts of Appeals' decision in this case.

Thus, focusing on the central state constitutional factor of context, and citing *Brian*'s reliance on *Immuno II*, the Court once again noted that in *Immuno II* it had "declined to adopt an analysis [i.e., *Milkovich*] that would require courts first to search the article for particular factual statements and then to hold such statements actionable unless couched in figurative or hyperbolic language (id. at 254)."

Then, proceeding to apply the *Immuno II* state constitutional, context-driven, "test to the facts of this case," 10 N.Y.3d at 277, the Court held that, "when viewed within the context of the article as a whole, a reasonable reader would conclude that the statements at issue were opinion."

Finally, although it did not expressly cite *Milkovich*, the Court of Appeals concluded by echoing its own by now oft-stated rejection of what it has viewed as the undesirable potential for "hypertechnical parsing" of "fact" from "opinion" under the federal *Milkovich* analysis. It therefore concluded that,

> "[a]lthough one could sift through the article and argue that false factual assertions were made by the author, viewing the content of the article as a whole, as we must, we conclude that the article constituted an

> expression of protected opinion and therefore, summary judgment should have been awarded to defendants (see Millus v Newsday, Inc. [citation omitted])." *Id.*

In other words, in the decision below there is no longer even a hint of any dual state/federal analysis of the kind which the Court of Appeals was careful to articulate and acknowledge in *Immuno II* and *600 West 115th Street*, in the immediate aftermath of the *Milkovich* remand. The Court below cited neither *Milkovich* nor any other federal constitutional precedent, confining itself to the New York case law, concerns, terminology and typology of its state constitutional analysis and its post-*Milkovich* state precedents emanating from *Immuno II*.

In sum, the decision below clearly rests on an independent and adequate state law ground under *Article I, §8* of the *N.Y.S. Constitution* and this Court is without jurisdiction to review it.

II. Even If This Court Had Jurisdiction To Review The Case, The Petition Articulates No Basis For Granting The Writ

Petitioner has articulated no basis for concluding that a different result in this case would have been mandated under a federal First Amendment analysis, either on the issue of constitutional protection for opinion or on the issue of his failure to prove a fact-based case of substantial falsity and actual malice.

Accordingly, even if this Court were to conclude that it has jurisdiction to review the Court of Appeals' decision, the Petition in any event presents no issue warranting review on certiorari.

In addition, the Petition should be denied because the questions it addresses are largely confined to application of settled New York common law and New York case law to the purported facts of the case and the Petition thus raises no issues of general importance, nor is there any suggestion of a split in the Circuits on any issue Petitioner has attempted to raise.

Moreover, the Petition also grossly – indeed quite shamelessly – misrepresents the facts and prior proceedings in the case and, for this reason alone, should be denied.

As but one example, Petitioner represents to this Court that "Defendants never raised any issue in the lower Court . . . regarding any defense under the Constitution, either in their papers or at trial," Pet. 6. Yet the unanimous Court of Appeals had noted that:

> "Before engaging in discovery, defendants moved to dismiss the complaint, contending that the action was filed in bad faith *to chill the exercise of protected free speech* and that the suit was frivolous. Supreme Court denied the motion and the Appellate Division *affirmed without addressing defendants' constitutional claim*. Thereafter, Mann moved for summary judgment on the complaint. Defendants opposed the motion and cross-moved

> for summary judgment *asserting that the article contained only expressions of opinion* by Abel. Supreme Court denied both motions on the ground that there were disputed issues of fact, and *did not address whether the article constituted protected opinion*." Pet. App. 2a-3a (emphasis added).

Although he evidently now purports to suggest that the Court of Appeals misrepresented or misapprehended the issues raised in the lower courts, Petitioner made no motion in the Court of Appeals for rehearing or reargument, on any basis, including its alleged misstatement of the factual record. Petitioner also neglects to advise this Court that he had previously moved to dismiss the appeal on the ground that no constitutional issues had been raised in the lower courts, but that motion was also denied by the Court of Appeals. 9 N.Y.3d 915 (N.Y. 2007).

Finally, on its face the Petition grossly misstates and misunderstands the modern constitutional law of defamation, *inter alia* citing defunct case law dating back prior to *New York Times Co. v. Sullivan*, 376 U.S. 274 (1964). *See, e.g.*, Pet. 15 (*citing Crane v. New York World Telegram Corp.*, 308 N.Y. 470 (N.Y. 1955) (defining the inapposite pre-*Sullivan* requirements for a defamation defendant's "plea of truth as justification").

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

(Excerpted from Respondents' [Appellants in the Court Below] Comments on Subject Matter Jurisdiction to N.Y. Court of Appeals, May 23, 2007, Page 6)

Substantiality and Merit of the Constitutional Questions Presented

Appellants respectfully submit that the case here for application of the pivotal and well-established constitutional limitations on public official defamation actions, as required under applicable state and federal constitutional provisions, is clear and overwhelming notwithstanding the Second Department's complete and inexplicable failure to recognize, address or properly construe and apply those unavoidable constitutional requirements.

– *A Substantial Constitutional Question is Directly Presented Regarding Construction and Application of the State Constitutional Privilege for Statements of Opinion*: Before the Appellate Division could have affirmed the Amended Judgment it must have found, although it did not in any way discuss or explain this implicit finding, that Respondent met his burden of demonstrating publication of one or more false and defamatory "factual assertions" about him with the requisite degree of fault. *Immuno AG* v. *Moor-Jankowski*, 77 N.Y.2d 235, 245, *cert. denied*, 500 US 954 (1991), *as cited in*, *Prozeralik* v. *Capital Cities Communications, Inc.*, 82 N.Y.2d 466, 473 (1993). Before the Second Department could properly have

affirmed the Judgment it must also have found, although it did not discuss or explain this finding either, that the jury's verdict did not punish protected statements of opinion in addition to any arguably actionable statements of fact. These implicit findings directly and necessarily presented a substantial constitutional question because there is no alternative, non-constitutional ground for otherwise upholding a verdict of defamation liability as to such statements.

The fundamental standards and general contours of the constitutional privilege for statements of opinion are well-established. In an unbroken series of defamation cases, dating back more than twenty years, this Court has developed a consistent line of authority mandating thoroughgoing and effective constitutional protection for statements of opinion. In *Steinhilber* v. *Alphonse*, 68 N.Y.2d 283, 289 (1986), this Court protected statements of "pure opinion" relying on First Amendment precedent. *See also Rinaldi* v. *Holt, Rinehart & Winston*, 42 N.Y. 2d 369, 380 (1977). Later, beginning with *Immuno AG*, *supra*, this Court expressed concern that the First Amendment as applied to statements of opinion by the U.S. Supreme Court may afford "insufficient protection . . . to central values protected by the law of this State." For that reason the Court staked out a new and independent state constitutional privilege, under Article I, Section 8 of the New York Constitution, and the Court has developed methods of analysis to identify and protect opinion even more broadly than

under the First Amendment. *See also*, *600 West 115th Street Corp.* v. *Von Gutfeld*, 80 N.Y.2d 130 (1992) (hyperbolic accusations held non-actionable in context as protected opinions); *Brian* v. *Richardson*, 87 N.Y.2d 46 (1995) (newspaper editorial held non-actionable despite suggestions of criminality).